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April 16, 1996

Hon. Reed E. Hundt

Chairman

Federal Communications Commission

1919 M Street, N.W., Room 814

Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Hundt:

WebCel Communications, Inc. ("WebCel") is a newly formed, entrepreneurial venture dedicated to the commercial deployment of Local Multipoint Distribution Service ("LMDS") as a broadband, competitive alternative for local exchange telecommunications, video services and Internet-related enhanced services. WebCel is extremely concerned that the Commission's Order in the LMDS proceeding—CC Docket No. 92-297—must include necessary safeguards to avoid outright takeover of another potential competitor and anticompetitive abuses by the Local Exchange Carriers ("LECs") and major cable television Multiple System Operators ("MSOs"). These entities have substantial economic incentives to forestall deployment of LMDS as a direct substitute for their facilities-based, monopoly networks.

Simply put, WebCel believes that *LMDS is the best short-run form of effective facilities-based competition with incumbent, monopoly LECs and cable MSOs*. The development of such competing local networks—in order to release the current monopoly bottlenecks held by the LECs and MSOs, for the benefit of all consumers—is a central goal of the landmark Telecommunications Act of 1996. For instance, the Act makes clear Congress' determination that local monopoly carriers should not have the power to thwart the growth of competitive markets, either by excluding competing networks from free access to subscribers through discriminatory interconnection (*e.g.*, Section 251) or by buying out facilities-based rivals in order to "nip competition in the bud" (*e.g.*, Section 652). It therefore conditions Regional Bell Operating Company ("RBOC") entry into long-distance services, within their regions, on the achievement of a competitive local telecommunications marketplace (Section 271) and allows cable system deregulation when an MSO faces "effective competition" from a telco facilities-based video services provider (Section 301(b)(3)).

Implementing the Act's charter for facilities-based local competition requires that the Commission take strong action to prevent monopoly carriers from using their dominant economic power to stifle competitive entry. In an auction environment this is doubly important, because the Commission only has one chance to set the right "rules of the road" for real competi-

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tion. Where a revolutionary service like LMDS is involved, it is imperative that the Commission get it right the first time.

WebCel's Proposal

Crafting regulations for LMDS that will realize the service's true potential for broadband, facilities-based local video and telephone competition requires:

- (1) Auction eligibility rules precluding LECs and MSOs from bidding for LMDS spectrum until there is effective, facilities-based competition for local exchange services and cable television services, respectively, within each of their local service areas.
- (2) "Buy-out" prohibitions that preclude a LEC or MSO from acquiring an LMDS licensee until effective, facilities-based competition exists.
- (3) Licensing regulations that preclude LECs and MSOs from investing in Designated Entities ("DEs"), or other preferred "entrepreneur" auction participants, who bid for LMDS spectrum within the same monopoly service territories.

These limitations would nevertheless allow the LECs and MSOs to bid for LMDS spectrum in the 80% of the nation where they do not hold monopoly franchises. Yet, they would eliminate any risk that this revolutionary new technology would be held back from developing into a truly competitive local telecommunications and information service to meet the narrow, self-interested incentives of the incumbent monopolists to delay and obstruct effective local competition. These limitations accordingly would curtail anticompetitive use of the auction process itself while retaining a large pool of bidding capital, diminishing participation in the LMDS auctions by less than a handful of potential bidders in each BTA.

LMDS—A Revolution in Wireless Communication

When originally proposed by CellularVision, LMDS was structured merely as a new form of wireless cable television service. Yet as the Commission's *Third Notice* recognizes, improvements in two-way transceiver technology now permit LMDS to offer a broad array of innovative narrowband to high-bandwidth services. Thus, LMDS is a precedent-setting new "product" for the American people, and is well-positioned to be the first realization of the National Information Infrastructure—the "information superhighway"—in the crucial "last mile" to telecommunications subscribers.

Moreover, unlike many of its single-purpose predecessors, LMDS can easily support both switched telephony and broadcast video services. Thus, LMDS will be capable of local exchange services and interexchange access (both switched through a LEC and Internet voice communications), robust "wireless cable" services and Internet access. WebCel plans to incorporate all these services, with a focus on small business and at-home office workers who need large,

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increasingly symmetric bandwidth by day and different services during evening hours. As such, WebCel intends to compete directly against the LECs and MSOs, within their regions, for their “core” telecommunications and video services.

Several additional facts make LMDS a unique and valuable resource for fostering the very type of local telecommunications capabilities that the Telecommunications Act of 1996 is designed to promote.

- ❑ LMDS is a truly *broadband* application. The approximately 1,000 MHz LMDS block, when deployed with frequency reuse, can provide massive voice and data throughput. For instance, LMDS offers 33 times the bandwidth available for any potential PCS licensee, and can support—within *each* cell—more than 250 digital video channels, well over 18,000 simultaneous voice-grade telephone circuits, or more than 500 interactive data channels operating at about 2 Mbps capacity. Combinations of these services are also possible.
- ❑ LMDS is essentially a *stationary* application—in large part due to technical issues regarding this Super-High Frequency—far better positioned than mobile services such as Personal Communications Services (“PCS”) or cellular radio to offer viable economic alternatives to fixed, twisted-pair and/or fiber-coax landline networks.
- ❑ LMDS is a *local* application—stemming from the Commission’s decision to auction and license LMDS on a BTA basis—with each of the 491 markets able to stand on its own as an independent business enterprise, and to interconnect with existing nationwide telephone (AT&T, MCI, etc.) and video (HBO, etc.) networks, without the need for nationwide “roaming” agreements or “lock-step” national standards.
- ❑ LMDS is a directly *competitive* application. Unlike earlier wireless services, including cellular, PCS and Multichannel Multipoint Distribution Service (“MMDS”), LMDS is technically and economically positioned to offer a full-service substitute for core LEC and MSO services, not merely “complementary” mobile services or limited-penetration, limited-channel video delivery systems. LECs or MSOs who deploy LMDS in their monopoly territories would thus, by definition, be horizontally integrating and assuming control of the very most likely potential competitor for their monopoly services.

The Need for Monopoly Bidder Exclusions

LMDS is not simply wireless cable, but has the bandwidth and flexibility to serve as facilities-based local competition in and of itself. For four straightforward reasons, the Commission should fashion auction eligibility rules that preclude monopoly LECs and MSOs from bidding for this valuable, competitive spectrum while they still wield monopoly power in their own service territories.

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First, as a legal matter **the Commission has the power and duty to maximize local facilities-based competitive alternatives:**

The 1996 Act commands the Commission to develop rules and regulations for local exchange competition, and established a framework to begin the process of tearing down regulatory and market barriers to facilities-based local competitive entry. The Act not only does nothing to prevent the Commission from imposing reasonable eligibility restrictions designed to implement the Act's procompetitive mandates, it specifically requires that the Commission "shall encourage the deployment . . . of advanced telecommunications capability [by] remov[ing] barriers to infrastructure investment." 47 U.S.C. § 706(a). *The largest barrier to competitive infrastructure investment is the risk that incumbent monopoly carriers will use their monopoly profits to "lock up" and then "warehouse" the unique resource of LMDS spectrum in order to forestall real local competition.*

Second, as a policy matter **the Commission has an opportunity to avoid the irreparable mistakes made during initial licensing of cellular franchisees that relegated cellular radio to a "complementary," non-competitive status vis-à-vis landline local exchange services:**

In cellular, the Commission decided, first, that each LEC should automatically be awarded one of two available cellular franchises within the LEC's service area and, second, that LEC "wireline cellular" companies should not be precluded from acquiring non-wireline licensees. As a result, within several years LECs owned virtually all cellular franchises nationwide, and cellular technology in the United States—unlike many foreign countries, which insisted on competitive operators—has never been exploited as a competitive threat to landline, monopoly telephone networks. *Auction eligibility limitations are necessary to ensure that LMDS technology is developed by licensees with a real economic interest in implementing truly competitive services, not additional "adjuncts" to solidify the power of landline switched telephone and cable networks.*

Third, as an equitable matter, **the auction eligibility limitations WebCel proposes will not harm the legitimate service interests of LECs and MSOs:**

Not only do these carriers actively profess to have existing networks over which they can provide an array of advanced services, they have been promising the Commission and Congress for years that they needed more regulatory freedom in order to expand, augment and rebuild their networks to offer broadband services to American subscribers. The hour is nigh. They can and should do so now. An LMDS bidding exclusion would not prevent a LEC from offering video services

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or prevent an MSO from offering telephone services, but only preclude them from acquiring, at this very critical time for the infusion of local competition, the most likely form of facilities-based competition with their existing services. *In short, if telcos or cable systems want to bring broadband services to their subscribers, they should be provided with real policy incentives to do so over their existing networks instead of acquiring potential direct competitors.*

Fourth, as a means to support entrepreneurial entry into the telecommunications industry, **the Commission should use clear bidding eligibility rules instead of speculative Designated Entity ("DE") credits and discounts, as were applied in the PCS Block C auctions:**

Not only were the DE rules the subject of intense litigation, judicial reversal and delay, but they focused solely on attempting to quantify the economic advantages of LEC size in order to create a "subsidy" for entrepreneurs. In reality, telecommunications entrepreneurs do not need a subsidy or bidding assistance if the substantive bidding rules place all auction participants on an even footing. Yet monopoly LECs and MSOs will have an inherent advantage when bidding against DEs, because it is economically rational for them to bid "above-market" prices for spectrum where the potential loss in monopoly profits to them exceeds the stand-alone present value of the spectrum to an unaffiliated entity. *Where monopoly carriers are allowed to participate in "in-region" auctions of competitive spectrum, their strategic interests create anticompetitive bidding incentives, meaning that the only way to ensure a "level playing field" is to bar LECs and MSOs from bidding on those BTAs in which they retain monopoly power.*

In sum, the Commission has ample grounds to bar MSOs and LECs from bidding on LMDS spectrum for BTAs in their service territories so long as these monopolists do not yet face effective and facilities-based local competition. Permitting incumbent monopolists to participate in the LMDS auctions without limitation would be the same as if the Commission approved a merger or buy-out of a competitive local exchange carrier or competitive access provider by a LEC, or of a competing MMDS provider by a cable system—anticompetitive transactions clearly prohibited by Section 7 of the Clayton Antitrust Act, the Telecommunications Act of 1996, or both. The Commission's obligation to consider market deconcentration and procompetitive regulatory measures is just as important in connection with procedures for auction of the nation's telecommunications spectrum, held in the public interest, as it is with these more "traditional" competition subjects, and it is perhaps more important in the long run.

Why Alternatives Will Not Work

The RBOCs and others, including some members of the Commission's Staff, have suggested that WebCel's proposals are overbroad in that they would "bias" auction competition or eliminate economies realizable by the LECs, and that "alternatives" such as build-out requirements can adequately achieve the same objectives. This is incorrect for three reasons.

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1. Auction Competition. Auction competition is designed to license spectrum for its most efficient economic use by allowing private entities to “self-select” winners. The economic facts are that the greater the potential for a given piece of spectrum to offer facilities-based competition to LECs and MSOs, the larger is the threat to their monopoly rents, and thus the larger is their “rational” economic auction bid. *In these circumstances, the Commission would be fooling itself to believe that an auction is fair or “efficient” if it includes monopoly carriers, because doing so would only allow incumbent bidders—but not others—to value their auction projections based on the “opportunity costs” of lost monopoly profits and market share.* The reality is that to make a fair and truly competitive auction for LMDS, monopoly carriers must be excluded. (Nor would such an exclusion impair the efficiency of capital market participation in the auctions, since the capital markets have already demonstrated a very substantial interest in participating in spectrum auctions. The “loss” of a handful of bidders in each BTA would hardly be noticeable.) Finally, participation in the auction process is a privilege, not a right, because the Commission’s mandate under the Telecommunications Act of 1996 remains to further the public interest with its auction decisions.

2. Incumbent “Efficiencies.” Whether or not LECs or MSOs could achieve economies of scope by entry into LMDS is not a serious issue, because no one has demonstrated, after three years of LMDS rulemaking consideration, that any such efficiencies exist. While there are some general marketing synergies—for instance, reduced advertising, billing and SG&A expenses—these are not specific to LECs or MSOs, and are not the type of service-related, efficiency-enhancing cost savings the Commission should be concerned with achieving. *And in any event, unless and until there is effective local competition, any such efficiencies would not benefit consumers, because the absence of market competition eliminates any need to “pass on” the efficiencies to end users, or even to shareholders.* The lack of competition merely undermines the market’s dynamic efficiency, leading to “monopoly sloth” and internal squandering of potential economies.

3. Build-Out Requirements. Finally, “build-out” requirements are undoubtedly important as a means of eliminating “trafficking” in auctioned licenses. Yet deadlines for system completion and similar build-out regulations only specify *when* some sort of service is to commence, not *what services* are to be offered. Monopoly RBOCs and MSOs have already revealed that they intend to utilize LMDS as an “adjunct” to their existing, network services—for instance teleconferencing for LECs (a tiny market today compared to telephony voice) and video-on-demand for MSOs (an unproven set of economics compared with broadcast video). None of these uses offers anything close to the full-featured, broadband local competition LMDS is capable of providing. This simply underscores that, *whether or not an existing monopolist constructs an LMDS system, it can just as easily effectively “warehouse” the spectrum by “clamping down” on its technical potential as a form of facilities-based local competition as by letting the spectrum remain “fallow,” unused or less than optimally utilized.*

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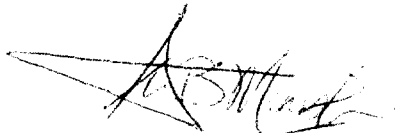
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Conclusion

The Commission has a unique and historic opportunity in this proceeding to craft rules to propel the United States into an era of real local telephone and video competition via LMDS. It can only do so, however, if necessary incentives are created for new entrants and safeguards are formulated to protect against anticompetitive use of the auction process itself. Barring LECs and MSOs from bidding for LMDS blocks within their monopoly service regions—until there is effective, facilities-based local competition—is necessary for LMDS to develop as a broadband, competitive local service alternative, and to avoid repetition of the costly mistakes made by the Commission in licensing of other potentially competitive technologies, such as cellular mobile radio.

Pursuant to Section 1.1206 of the Commission's Rules, two copies this letter have been delivered to the Commission's Secretary for filing in this proceeding. Please contact the undersigned counsel or David J. Mallof, President of WebCel (202-986-4778), should you have any questions in regard to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "G. B. Manishin", with a stylized, sweeping flourish extending from the end.

Glenn B. Manishin

GBM:hs

cc: Hon. James H. Quello
Hon. Rachelle B. Chong
Hon. Susan Ness
Michelle Farquhar, Chief, Wireless Telecommunications Bureau
William E. Kennard, General Counsel
James Olson, Chief, Competition Division, OGC